

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **OAKLAND DIVISION**

11 IN RE: CATHODE RAY TUBE (CRT)
12 ANTITRUST LITIGATION

Master File No. 07-CV-5944-JST

MDL No. 1917

13 This Document Relates to:

14 *ALL DIRECT PURCHASER ACTIONS*

**[PROPOSED] ORDER GRANTING DIRECT
PURCHASER PLAINTIFFS' MOTION FOR
CHUMAN CERTIFICATION OF THE IRICO
DEFENDANTS' APPEAL**

15
16 Date: February 5, 2020

17 Time: 2:00 p.m.

Judge: Honorable Jon S. Tigar

18 Courtroom: 6 - 2nd Floor
19
20
21
22
23
24
25
26
27
28

1 The Court, having reviewed Direct Purchaser Plaintiffs’ (“DPPs”) Motion for *Chuman*
 2 Certification of the Irico Defendants’ Appeal (“Motion”), dated November 27, 2019, the Irico
 3 Defendants’ memorandum of points and authorities in opposition thereto, DPPs’ reply brief, the
 4 declarations in support of the foregoing, the pleadings and other papers on file in this action, and
 5 the statements of counsel and the parties, and good cause appearing, hereby finds that:

6 1. The Irico Defendants’ delay of over nine years in asserting their Foreign Sovereign
 7 Immunities Act (“FSIA”) defense is manifestly dilatory and alone supports a finding that they have
 8 forfeited an immediate appeal. It almost doubles the five-year delay that the court in *Yates* made
 9 clear would support a forfeiture certification. *Yates v. City of Cleveland*, 941 F.2d 444, 448 (6th
 10 Cir. 1991). It is many times longer than the 500 day delay condemned by the Court in *Davis v.*
 11 *White*, Nos. 7:17-cv-01533-LSC, 7:17-cv-01534-LSC, 7:17-cv-01535-LSC, 2019 WL 5081074, at
 12 *8 (N.D. Ala. Oct. 10, 2019). As in *Davis*, moreover, the Irico Defendants “acted in a manner
 13 consistent with the intent to litigate the case in federal court. They participated in discovery. They
 14 made every effort to have the district court dismiss Plaintiffs’ claims. And all the while, they kept
 15 their [FSIA defense] tucked away for a rainy day.” *Id.* Not only is the conclusion that the Irico
 16 Defendants have failed to exercise “a reasonable modicum of diligence” with regard to the
 17 assertion of their FSIA defenses inescapable, it is clear that delay of this action was intended. *See*
 18 *Yates*, 941 F.2d at 449 (“a defendant’s right to bring an interlocutory appeal under *Forsyth* brings
 19 with it a concomitant responsibility on the part of the defendant to exercise ‘a reasonable modicum
 20 of diligence in the exercise of that right’”).

21 2. Second, the additional delay of more than eighteen months caused by the Irico
 22 Defendants’ improper relitigation of their commercial exception arguments is also a sufficient basis
 23 for a forfeiture certification. As the Court has previously stated, the Irico Defendants filed what
 24 amounted to an improper and untimely motion for reconsideration, at least as to the commercial
 25 exception. *See* Order Regarding Motions to Dismiss for Lack of Jurisdiction at 12, ECF No. 5637
 26 (Oct. 28, 2019). If the commercial exception applies, there is no basis to stay or otherwise delay
 27 DPPs’ prosecution of their case against the Irico Defendants. This is true regardless of whether
 28 Display qualifies as an organ of the state. The Irico Defendants must certainly have known that

1 they did not plan to submit any relevant new evidence through the entire jurisdictional discovery
 2 process. It is accordingly reasonable to treat their second motions to dismiss as dilatory and as an
 3 additional basis for a forfeiture certification.

4 3. In addition, the Irico Defendants delayed the resolution of their second motion
 5 through dilatory and incomplete responses to jurisdictional discovery. DPPs, along with Indirect
 6 Purchaser Plaintiffs, were required to obtain three Court orders compelling such discovery,
 7 including one compelling compliance with a Court order. *See* ECF Nos. 5320, 5331, 5332. The
 8 Irico Defendants' conduct also repeatedly delayed the depositions of their witnesses.

9 4. The delaying conduct of the Irico Defendants has "injure[d] the legitimate interests
 10 of other litigants and the judicial system" in this case. *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th
 11 Cir. 1989). Again, the Court has already found that DPPs have suffered the very types of harm that
 12 motivated the exception for frivolous or dilatory assertions of immunity defenses. *See In re*
 13 *Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, Case No. C-07-5944 JST, 2018 WL
 14 659084, at *8 (N.D. Cal. Feb. 1, 2018); *see also Apostol*, 870 F.2d at 1338; *Yates*, 941 F.2d at 448–
 15 49. And, as noted above, the Irico Defendants have confirmed that important documentary
 16 evidence relating to their participation in the conspiracy has been lost. There can be no question
 17 that the Irico Defendants have "gain[ed] from delay at [DPPs'] expense," *Apostol*, 870 F.2d at
 18 1338, including the initial delay in asserting their defense and the additional delay from their
 19 second jurisdictional motion. They now seek to augment those gains by staying the case based on
 20 an asserted right to an "immediate appeal[]," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)—even
 21 though their conduct shows that an immediate resolution of their FSIA defense has been the last
 22 thing the Irico Defendants have desired.

23 Accordingly, the Court hereby ORDERS:

24 1. On the basis of the foregoing, the Court hereby certifies in writing, pursuant to
 25 *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992), that the Irico Defendants' assertion of their FSIA
 26 defense was dilatory and therefore their entitlement to an immediate appeal of the Court's Order
 27 Regarding Motions to Dismiss for Lack of Subject Matter Jurisdiction (ECF No. 5637) is forfeited.

28 2. The Court shall retain jurisdiction over this matter pending appeal.

1 3. The Irico Defendants' motion for a stay (ECF No. 5651) is denied.

2 4. The Irico Defendants shall respond to the written discovery previously served on
3 them within 30 days of this order. A Case Management Conference to discuss pretrial and trial
4 scheduling is set for _____. The parties shall meet and confer and file CMC statements by
5 _____.

6 5. To the extent the Irico Defendants intend to seek a stay of this proceeding in the
7 Circuit Court as specified in *Chuman*, they shall do so within fourteen (14) days of this order.

8 **IT IS SO ORDERED.**

9
10 Dated: _____

HONORABLE JON S. TIGAR
UNITED STATES DISTRICT JUDGE